STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 19, 2006
v	No. 263269 Wayne Circuit Court
SAMUEL CASTON, Defendant-Appellant.	LC No. 05-001101-01

Before: Meter, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of being a felon in possession of a firearm (felon in possession), MCL 750.224f, and possession of a firearm during the commission of a felony, second offense (felony-firearm), MCL 750.227b. Defendant was sentenced to a mandatory term of five years' imprisonment for the felony-firearm conviction and to a suspended sentence for the felon in possession conviction. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Police executed a search warrant inside a house where defendant had recently sold illicit drugs to an informant. One of the police officers saw defendant walk out of an upstairs bedroom. Police searched the bedroom and found men's clothing, a duffel bag containing narcotics paraphernalia, a handgun, mail addressed to defendant, and a box containing defendant's personal effects. Defendant's father testified that defendant did not live in the house, but he also testified that defendant often showered and spent the night there, that defendant received mail there, and that the upstairs bedroom was used to store defendant's belongings, including his mail.

On appeal, defendant's appellate counsel argues that there was insufficient evidence that defendant constructively possessed a firearm, because no evidence connected him to the room where the bag containing the firearm was found, no fingerprints were found on the firearm, many other people had access to the room, and defendant made no effort to move the firearm to a different location during the course of the raid. "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). To establish

possession of a firearm, the prosecution must establish either actual or constructive possession of the firearm. *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). "[A] person has constructive possession if there is proximity to the article together with indicia of control." *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989). Constructive possession of a firearm is established "if the location of the weapon is known and it is reasonably accessible to the defendant." *Id*. at 470-471.

Here, the prosecution presented evidence that defendant was observed walking out of the bedroom in which the firearm was found. The bedroom looked lived-in and it contained men's clothing and several boxes containing defendant's possessions and mail addressed to him. A duffel bag was found in the room containing a handgun, drug paraphernalia, and mail addressed to defendant. Viewed in a light most favorable to the prosecution, the trier of fact could reasonably infer that defendant had control over the duffel bag and its contents. It is for the trier of fact to assess the weight of this type of circumstantial evidence. See *People v Hardiman*, 466 Mich 417, 421-423; 646 NW2d 158 (2002). Therefore, defendant's insufficiency of the evidence argument fails.

In a supplemental brief filed in propria persona, defendant raises several other issues. He first argues that the trial court, after finding that the address written on the mail in the duffel bag constituted inadmissible hearsay, erred in relying on the same mail in determining that he constructively possessed the firearm. Defendant contends the court's reliance on this inadmissible hearsay deprived him of a fair trial. Although defendant objected to admission of the address that was written on the mail in the duffel bag, he did not object to the admission of the mail itself. Therefore, this issue is not preserved for appellate review, and we review it for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

In this case, placing defendant's name on the envelopes was not a "statement," or assertion, for hearsay purposes, so defendant's hearsay argument lacks merit. MRE 801; *People v Harris*, 201 Mich App 147, 150-151; 505 NW2d 889 (1993). Although the trial court cautiously disallowed the "statements" of defendant's residence on the addressed envelopes, defendant fails to explain how the same rule would apply to what he concedes is his name. Moreover, the envelopes were not admitted for the purpose of proving that defendant resided at the address listed or that it was his actual name. Rather, the envelopes were admitted for the purposes of linking defendant to the duffel bag and its contents. The fact that envelopes with defendant's name on them were found in the duffel bag along with the handgun strongly suggests that defendant exercised dominion and control over the bag and its contents. See *Hardiman*, *supra*.

Defendant next contends that counsel was ineffective in failing to object to the admission of the mail from the duffel bag because it was not authenticated and, therefore, irrelevant. We disagree. Because defendant did not raise the issue in the trial court or seek a *Ginther*[1] hearing, we limit our review of defendant's claims to mistakes apparent on the record. *People v Riley*

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

(After Remand), 468 Mich 135, 139; 659 NW2d 611 (2003). To comply with the preliminary requirement of authentication, a proponent must provide "evidence sufficient to support a finding that the matter in question is what its proponent claims." MRE 901(a). A court may consider the proposed evidence's "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." MRE 901(b)(4).

The prosecution presented testimony that the duffel bag contained "mail" in the form of "some letters with the defendant's name on it." This constituted evidence sufficient to support the prosecution's claim that the envelopes from the duffel bag were what the prosecution claimed them to be—mail "with the defendant's name on it." MRE 901(b)(1). The testimony regarding the appearance of the letters alone constitutes appropriate authentication under MRE 901(b)(4). No actual letters or anything involving the substance of the mail was admitted, so further authentication was not necessary. The mail was relevant for the purpose of establishing defendant's constructive possession of the duffel bag and its contents, which bore on a material issue at trial. MRE 401. Because defendant's challenge to the authenticity and admissibility of the evidence lacks merit, trial counsel was not ineffective for failing to present the arguments to the court. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

Defendant next contends that counsel was ineffective in failing to move to suppress the firearm on the ground that the warrant upon which it was obtained was not issued by a neutral and detached judicial officer. Defendant presents a copy of the first page of the two-page search warrant and argues that the warrant is not signed by a magistrate but by somebody named "Shull." Defendant contends that there is no judge or magistrate of the 36th District Court named "Shull." However, there is a 36th District Court Magistrate named Sidney Barthwell, and the bar number on the warrant matches Judge Barthwell's bar number. Although we do not pretend to be expert calligraphers, defendant provides only supposition that someone forged Judge Barthwell's bar number, but honestly signed under the name "Shull." Short of making unreasonable assumptions into how Judge Barthwell's scrawl would have appeared if the *real* Judge Barthwell would have signed the warrant, we must reject defendant's argument as unsubstantiated. The warrant sufficiently identified Judge Barthwell as the issuing magistrate, and defendant acknowledges that Judge Barthwell had the authority to issue the warrant. Moreover, defendant's attempt to bootstrap the warrant's deficiency into his appeal by resorting to an ineffective assistance of counsel claim further undermines the claim's validity. Effective assistance of counsel is presumed, *Riley*, *supra* at 140, and defendant has failed to overcome the presumption that trial counsel simply recognized Judge Barthwell's signature, or knew that the trial court probably would, and strategically decided not to raise the issue so that he could preserve the defense's credibility. We will not second-guess a trial attorney's decision in such cases. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Finally, defendant argues that counsel was ineffective in failing to object to the prosecution's waiver of potential witness Officer Sheron Johnson. Defendant contends that Johnson authored the Search Warrant Return, which did not report the seizure of mail addressed to defendant, lotto packs, or a blue bag, as other officers had testified. Defendant further contends that Johnson authored the Investigator's Report, in which Johnson stated she would testify "to obsv. perp discard susp. narcotics." Defendant claims that Johnson's testimony was important for the purpose of impeaching the other officers. However, "the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a

substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). It is unclear from the "Search Warrant Return" document supplied by defendant that it was completed by Johnson, and defendant fails to provide record support for his bald assertions that the officer's testimony would contradict the other officers' testimony. *People v Pickens*, 446 Mich 298, 327; 521 NW2d 797 (1994). Moreover, the proffered "DPD Investigator's Report" indicates that Johnson "will testify to obsv. perp discard susp. narcotics," and defendant fails to explain how this testimony would have aided in his defense. Therefore, he has not demonstrated that Johnson's testimony might have produced a different outcome at trial. *Id*.

Affirmed.

/s/ Patrick M. Meter
/s/ Peter D. O'Connell
/s/ Alton T. Davis